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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/801,258	03/15/2004	Aaron M. Lamstein	545.44	2246

7590 06/30/2008  
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EXAMINER
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SILBERMANN, JOANNE

ART UNIT	PAPER NUMBER
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3611

MAIL DATE	DELIVERY MODE
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06/30/2008

PAPER

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UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE BOARD OF PATENT APPEALS  
AND INTERFERENCES

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*Ex parte* AARON M. LAMSTEIN

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Appeal 2008-1310  
Application 10/801,258  
Technology Center 3600

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Decided: June 30, 2008

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Before MURRIEL E. CRAWFORD, JENNIFER D. BAHR, and LINDA E.  
HORNER, *Administrative Patent Judges*.

BAHR, *Administrative Patent Judge*.

DECISION ON APPEAL

STATEMENT OF THE CASE

Aaron M. Lamstein (Appellant) appeals under 35 U.S.C. § 134 from the Examiner's decision rejecting claims 1-12. We have jurisdiction over this appeal under 35 U.S.C. § 6 (2002).

*The Invention*

Appellant's claimed invention is directed to a system for displaying multiple packages for purchase by consumers (Specification 1:8). Claim 1 is illustrative of Appellant's claimed invention and reads as follows:

1. A system for displaying multiple packages for purchase by consumers, said system comprising a segmented display that identifies characteristics of a single entity and codes each segment of said segmented display to differentiate each characteristic from other characteristics of said segmented display and positioning<sup>[1]</sup> said multiple packages spaced apart from said segmented display, each of said multiple packages further exhibiting at least one of said codes to enable a consumer to associate a package with a characteristic of said entity.

*The Rejection*

Appellant seeks review of the Examiner's rejection of claims 1-12 under 35 U.S.C. § 103(a) as unpatentable over Anderson (US 4,249,318, issued February 10, 1981) and Ali (US 6,042,151, issued March 28, 2000), and further in view of official notice that paint tubes including an indication, either on the tube itself or on a label on the tube, of what color paint is in the tube, were known at the time of Appellant's invention.

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<sup>1</sup> We understand the limitation "positioning said multiple packages" in claims 1 and 12 to be a structural limitation that said multiple packages are positioned as set forth in the claims. In the event of further prosecution of the subject matter of these claims, Appellant should consider amending claims 1 and 12 to change "positioning said multiple packages" to "said multiple packages positioned so as to be" to correct this informality and eliminate any ambiguity as to whether Appellant's claims are method claims or product claims.

## THE ISSUES

At issue in this appeal is whether Appellant demonstrates that the Examiner erred in rejecting claims 1-12 under 35 U.S.C. § 103(a) as unpatentable over the combined teachings of Anderson, Ali and the official notice. Appellant contends that both Anderson and Ali teach away from Appellant's invention, because the products offered are displayed together with the color chart and grit size chart, respectively, and thus are not "spaced apart from" the segmented display, as called for in claims 1 and 12 (Appeal Br. 4 and 6-7).<sup>2</sup> The Examiner contends that Anderson shows packages spaced apart from the segmented display in figure 7 (Answer 3). Appellant further contends that the rejection of claims 1-12 "appears to be based upon a hindsight reconstruction in which isolated disclosures have been picked and chosen in an attempt to deprecate the present invention" (Appeal Br. 5). Specifically, Appellant argues that "it does not appear to be realistically conceivable that one familiar with Anderson would combine his teachings with those of Ali for any purpose whatsoever" (*id.*)

## FINDINGS OF FACT

FF1. Appellant's Specification and original claims, as submitted on the March 15, 2004, filing date of this application, do not explicitly disclose that the packages are "spaced apart from" the segmented display. Figure 1 illustrates the display and figure 2 shows a typical multiple package layout, displayed for example on peg bar hooks, for use with the segmented display of figure 1 (Specification 2:21-

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<sup>2</sup> We make reference in this opinion to the Appeal Brief, filed May 18, 2006 and the Examiner's Answer, mailed June 26, 2006.

24 and 3:15-16). The relative positioning of the segmented display and the packages is not depicted in either of the figures.

Appellant's Specification states that "[m]ultiple packages are positioned *proximate* the segmented display" and "[t]he segmented display is positioned *proximate* to the multiple packages offered for sale" (Specification 1:11-12 and 2:16-17) (emphasis ours).

Additionally, Appellant's Specification discloses that the consumer would first go to the segmented display in order to identify the need or want of, for example, a pet by color, number, or letter code and then proceed to the peg bar display to identify the column wherein the coding relating to that need or want is presented (Specification 3:17-22). On the basis of this underlying disclosure, we understand that the segmented display is positioned proximate to the packages but is distinct, or spaced apart, from the packages. In other words, the segmented display is not positioned on the packages themselves.

FF2. Anderson teaches several embodiments of display racks for holding an array of coloring material containers, such as oil pigment tubes of oil-based pigments (col. 12, ll. 19-20). For example, as depicted in figure 7, a carousel arrangement includes a cylindrical housing 20 rotatably supported on a base 22 in lazy susan fashion. A color chart according to figure 4 is printed or otherwise reproduced on the upper surface portion 24 of the housing, with the respective artist's color wheels associated with each palette 12 disposed along the outer periphery thereof. Beneath each color wheel is a vertical array of radial compartments 26 in

which the coloring material containers are disposed. Each container contains a coloring material of one of the basic colors corresponding to the color chart and palette as described by Anderson (cols. 9 and 10), with varying value gradations disposed along vertically descending compartments 26. Anderson, col. 12, ll. 6-25. A flat rectangular array packaged as a carrying case 30 is depicted in figure 9. This embodiment comprises a rectangular array of compartments 36 holding containers of coloring material and a lower surface portion 40 carrying the color wheels associated with each family of coloring materials. Anderson, col. 12, ll. 26-41. Figure 8 depicts a third embodiment in the form of a narrow width carousel unit comprising a narrow diameter cylindrical housing 42 and a lower larger diameter base surface 44 on which the color wheels are imprinted. Anderson, col. 12, ll. 42-51. The coloring material containers in all three embodiments are spaced apart from the color wheels and palettes.

FF3. Ali teaches a single sheet sandpaper delivery system in which single sheet delivery packages 14 of varying grit size are disposed in trays or shelves 16 of a display housing 10 (col. 2, ll. 21-27; fig. 2). Each individually packaged sandpaper sheet has a working surface 18 with a grit 20 formed thereon and bears indicia 24 specifying the grit size and an application legend 26 imprinted on the opposite surface thereof (col. 2, ll. 28-31; fig. 1). The application legend specifies a series of grit size groupings 28, 30, 32, 34, one of which corresponds to the indicia 24, and an associated sanding application 36, 38, 40, 42 (col. 1, ll. 52-57; col.

2, ll. 39-42). Ali's single sheet sandpaper delivery system is intended for delivery (sale) to the consumer (col. 1, ll. 14-16). Ali shows indicia specifying grit size on the display housing 10 above each column of shelves 16 (fig. 2). These indicia are spaced apart from the single sheet delivery packages 14.

## DISCUSSION

Appellant argues in favor of patentability of claims 1-12 together as a group (Appeal Br. 3-7). Appellant does not specifically mention claim 12 in the arguments in the Appeal Brief. In view of Appellant's indication that the appeal is from the rejection of claims 1-12 (Appeal Br. 1), we treat claim 12 as grouped with claims 1-11. In accordance with 37 C.F.R. § 41.37(c)(1)(vii), we select claim 1 as the representative claim to decide this appeal, with claims 2-12 standing or falling with claim 1.

Ali teaches a system for displaying multiple packages (single sheet delivery packages 14) for purchase by consumers including a segmented display (indicia specifying grit size on the display housing 10) and multiple packages (single sheet delivery packages 14) disposed in compartments spaced apart from the segmented display. Ali further teaches indicia 24 on the package 14 coded to enable the consumer to associate a package with a characteristic (grit size or sanding application) identified in a segment of the segmented display. (FF3.) In summary, Ali teaches a system satisfying the limitations of claim 1, wherein the entity is a sanding application or grouping of grit sizes and the packages are single sandpaper sheet delivery packages.

Anderson teaches the use of a similar system for displaying containers of coloring material in arrays corresponding to color wheels and palettes imprinted on the display housing spaced apart from the containers (FF2). The Examiner finds that Anderson does not expressly indicate that the containers exhibit at least one of the codes corresponding to colors in the color wheel or palette, but takes official notice that paint tubes including an indication, either on the tube itself or on a label on the tube, of what color paint is in the tube, were known at the time of Appellant's invention (Answer 3). Appellant does not dispute that such indicia on paint tubes were well known at the time of Appellant's invention. The Examiner concludes that it would have been obvious to include such indicia on Anderson's tubes so that the tubes can be correctly replaced in the proper compartment if removed from the display (*id.*) While Anderson does not teach the use of the disclosed system for purchase of the coloring material containers by consumers, it is certainly capable of such use.

As shown above, the combined teachings of Ali and Anderson evidence not only that the system recited in claim 1 was known in the art at the time of Appellant's invention but also that the display of an array of packages of products coded with indicia corresponding to codes in a segmented display spaced apart from the packages themselves has applicability to a variety of products.

Appellant's position that both Anderson and Ali teach away from Appellant's invention, because the products offered are displayed together with the color chart and grit size chart, respectively, and thus are not "spaced apart from" the segmented display, as called for in claims 1 and 12, is not well taken. As discussed above, we find that both Anderson and Ali teach



positioning packages spaced apart from the segmented display (FF2 and FF3). As pointed out in our findings, Ali shows a segmented display comprising indicia of groupings of grit sizes for known sanding applications above each column of shelves (FF3). Anderson shows a segmented display comprising a color wheel and palette imprinted on the display housing (FF2). In each case, the segmented display is positioned at a location that is distinct, or spaced apart, from the packages or containers themselves.

Appellant's argument appears to imply that Anderson and Ali are deficient in that their segmented displays are disposed on the display housings and not at a location spaced apart from the display housings. Such an argument is not commensurate with the scope of claim 1, which merely requires that the packages be spaced apart from the segmented display, not that the segmented display be spaced apart from the display housing in or on which the packages are disposed. When construing claim terminology in the United States Patent and Trademark Office, claims are to be given their broadest reasonable interpretation consistent with the specification, reading claim language in light of the specification as it would be interpreted by one of ordinary skill in the art. *In re Am. Acad. of Sci. Tech. Ctr.*, 367 F.3d 1359, 1364 (Fed. Cir. 2004). The terms "space" and "apart" are ordinarily understood to mean "to arrange with space or spaces between" and "1. to one side; at a little distance; aside 2. separately or away in place or time," respectively. *Webster's New World Dictionary* 63, 1636 (David B. Guralnik ed., 2<sup>nd</sup> Coll. Ed., Simon & Schuster, Inc. 1984). Accordingly, the ordinary and customary meaning of "spaced apart from" is arranged at a little distance from or with spaces between. Appellant's Specification gives no indication that Appellant is defining "spaced apart from" in any manner that

differs from such ordinary and customary meaning. In fact, Appellant's use of the terminology "proximate" to describe the positional relationship between the packages and the segmented display conveys a sense of minimal spacing between the packages and the segmented display. We thus find that the positional relationship between the segmented displays and the containers or packages of Anderson and Ali satisfies the "spaced apart from" limitation of claim 1.

Appellant's argument that one familiar with Anderson would not combine his teachings with those of Ali "for any purpose whatsoever" likewise fails to persuade us of reversible error in the Examiner's rejection of claim 1. First, as discussed above, we find that Ali teaches all of the limitations of claim 1, with or without combination with Anderson. Moreover, the fact that Anderson specifically addresses display of coloring material containers while Ali is directed to display of single sheet sandpaper packages in no way precludes combination of their teachings "for any purpose whatsoever."

When a work is available in one field of endeavor, design incentives and other market forces can prompt variations of it, either in the same field or a different one. If a person of ordinary skill can implement a predictable variation, § 103 likely bars its patentability. For the same reason, if a technique has been used to improve one device, and a person of ordinary skill in the art would recognize that it would improve similar devices in the same way, using the technique is obvious unless its actual application is beyond his or her skill.

*KSR Int'l. Co. v. Teleflex Inc.*, 127 S.Ct. 1727, 1740 (2007).

In this case, a person of ordinary skill in the art would appreciate from the teachings of Anderson and Ali that the use of segmented displays identifying characteristics and coding segments of the display to differentiate such characteristics, in conjunction with indicia on multiple packages, displayed for sale or use, exhibiting one of the codes to enable a consumer (purchaser or user) to associate a package with a particular characteristic, has applicability to a variety of products. The person of ordinary skill in the art would recognize that such a display system would permit a consumer to quickly identify products falling into the category specified in a particular segment of the segmented display.

For the above reasons, Appellant's arguments do not demonstrate reversible error in the Examiner's rejection of claim 1 as unpatentable over Anderson and Ali. We sustain the rejection of claim 1 and claims 2-12, which stand or fall with claim 1.

#### DECISION

The decision of the Examiner to reject claims 1-12 under 35 U.S.C. § 103(a) is affirmed.

No time period for taking any subsequent action in connection with this appeal may be extended under 37 C.F.R. § 1.136(a). *See* 37 C.F.R. § 1.136(a)(1)(iv) (2007).

AFFIRMED

vsh

Appeal 2008-1310  
Application 10/801,258

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